No. 995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

SIMON METRIK,

Petitioner,

—against—

FORT TRYON GARDENS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE TERM, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF

JACOB W. FRIEDMAN,
Attorney for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE TERM, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner Simon Metrik respectfully prays for a writ of certiorari to the Appellate Term, First Department, of the Supreme Court of the State of New York, the highest court of the State in which a decision could be had, to review a determination of that Court, rendered on June 14th, 1944, affirming an order of the Municipal Court of the City of New York, denying petitioner's motion to vacate a certain final order of the said Municipal Court, which final order awarded to respondent the possession of certain real property (R. 57-59). The time for filing the present petition for certiorari has been extended by Mr. Justice Jackson to and including March 1st, 1945 (R. 80).

Statement of Matters Involved

This is a summary proceeding to recover possession of an apartment dwelling in New York City, of which the petitioner herein was the tenant and the respondent herein the landlord. Respondent sought to oust petitioner as a holdover on the theory that his lease had expired (R. 4-5), while petitioner contended that the lease had been renewed for an additional year (R. 9, 12).

The proceeding was commenced by the service of a copy of the petition and precept on petitioner's wife on September 15th, 1943, returnable the same day at 12:05 P. M. (R. 3). The exact hour and minute of service became material in view of the New York statute, which will hereinafter be discussed, requiring a minimum notice of two hours. Petitioner urged that the service was effected at 10:30 A. M., and certainly not before 10:15 A. M. (R. 10, 13), while respondent insisted that service was made at 10:02 A. M. (R. 18). In other words, respondent argued that it had given 2 hours 3 minutes notice of the proceeding, while petitioner contended that the notice given was substantially less than two hours. This issue was ultimately resolved in favor of respondent, however unjustly (R. 57), and for the purposes of the present petition it will be assumed that the notice actually given was 2 hours 3 minutes.

There is no controversy regarding the fact that the papers were served only on the wife of the petitioner and that she was at home at the time with two young children (R. 9). Petitioner, who is an attorney, was then en route to fulfil a court engagement in Jamaica, a considerable distance from his home in uptown Manhattan, and his wife found it impossible to communicate with him until the eviction was actually taking place (R. 9). At 12:05 P. M. the respondent proceeded to take an inquest, obtained a final order awarding to it the possession of the premises and immediately turned over the warrant of dispossess to a marshal for

hold furniture was in the course of being removed from the execution. That same afternoon, while petitioner's house-apartment and placed on the sidewalk, his wife finally succeeded in reaching him (R. 9). He hastily prepared and obtained an order to show cause the same day (R. 8), making his motion returnable the following day. His original and supplemental affidavits (R. 9-13) urged divers grounds for invalidating the proceedings theretofore had, including the following (R. 11):

> "In any event, should Civil Practice Act, Sections 1419 and 1421, be construed as permitting my eviction, on two hours' so-called notice left at my home in my absence, I respectfully urge the unconstitutionality of those statutes as being contrary to the provisions of the Constitution of the United States, Amendment XIV, Sec. 1, forbidding the deprivation of property without due process of law. I submit that due process of law must include reasonable notice, which notice is not afforded herein."

He also showed facts indicating the existence of a meritorious defense to the proceeding (R. 12), as to which defense, incidentally, he has not yet succeeded in having his day in court. On the hearing of the motion, petitioner urged all grounds, including the constitutional one, and asked that the proceeding be dismissed as a nullity or that he be given an opportunity to defend on the merits. His motion was denied on September 30th, 1943. On appeal to the Appellate Term of the Supreme Court, First Department, the order appealed from was, on March 2d, 1944, reversed and the case remitted for the taking of oral testimony as to the time of service of the precept.

About one half of the transcript of record (R. 17-57) consists of the testimony on the hearing as to the time of service. None of this matter is pertinent to the issues on the

certiorari petition, but is included on the insistence of respondent, the latter having declined to stipulate as to any curtailment of the record. The Municipal Court, before which the constitutional question was again asserted (R. 54-55), overruled the traverse on March 9th, 1944, and denied petitioner's motion to vacate the final order in the summary proceeding (R. 57).

Petitioner again duly appealed to the Appellate Term of the Supreme Court, First Department, and the order appealed from was affirmed on June 14th, 1944 (R. 58). Petitioner duly applied to the said Appellate Term for permission to take a further appeal to the Appellate Division of the Supreme Court, First Department, and on June 19th, 1944, this application was denied (R. 64-65). A like motion, addressed to the Appellate Division of the Supreme Court, First Department, was duly made and by that Court likewise denied on October 13th, 1944 (R. 79-80). Accordingly, the said Appellate Term of the Supreme Court was the highest court of the State in which a decision could be had. As has been heretofore noted, the time for applying for certiorari has been duly extended to March 1st, 1945 (R. 80).

The constitutional question was presented on the first opportunity in the Municipal Court and was preserved and argued before every appellate tribunal on each appeal and motion.

Question Presented

Are Sections 1419 and 1421 of the New York Civil Practice Act, in so far as they permit the issuance of a final order and an eviction upon two hours' notice, unconstitutional in that they provide for insufficient notice and therefore violate due process of law, in contravention of the Constitution of the United States, Amendment XIV, Section 1?

Reason for Allowance of Writ

The holdings of the courts of New York that a person may lawfully, under the statutes involved, be deprived of the possession of real property through a proceeding concluded two hours after its inception, destroy the requirement of reasonable notice as an indispensable element of due process; these holdings are at variance with controlling authority and with the common, accepted understanding of the law; and the statutes appear to be plainly repugnant to the due process clause of the Constitution.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the Appellate Term, First Department, of the Supreme Court of the State of New York, commanding said Court to certify and send to this Court, on a date to be designated, a full and complete transcript of the record of all proceedings of said Appellate Term, First Department, of the Supreme Court of the State of New York, had in this cause, to the end that this cause may be reviewed and determined by this Court; that the determination of the Appellate Term, First Department, of the Supreme Court of the State of New York, be reversed, and that petitioner be granted such other, further and different relief as may seem proper.

Dated, New York, N. Y., February 26th, 1945.

SIMON METRIK,

By JACOB W. FRIEDMAN,
Attorney for Petitioner.

IN THE

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—against—

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Respondent.

BRIEF IN SUPPORT OF PETITION

Opinions Below

No opinion was rendered by the Municipal Court, the Appellate Term of the Supreme Court or the Appellate Division of the Supreme Court.

Jurisdiction

The determination of the Appellate Term, First Department, of the Supreme Court of the State of New York, now sought to be reviewed was rendered on June 14th, 1944 (R. 58-59); the Appellate Division denied petitioner's motion for a further appeal on October 13th, 1944 (R. 79-80); and the time to apply for certiorari was extended by Mr. Justice Jackson to and including March 1st, 1945 (R. 80).

The jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code as amended, otherwise known as 28 U. S. C., Section 344, Subdivision b.

Statutes Involved

The subject sections of the Civil Practice Act of the State of New York are as follows:

> "Section 1419. PRECEPT; RETURN. The precept must be returnable not less than five nor more than ten days after it is issued; except that, where the proceeding is taken upon the ground that a tenant continues in possession of demised premises after the expiration of his term without the permission of his landlord and the application is made on the day of the expiration of the lease or on the next day thereafter, the precept may, in the discretion of the judge or justice, be made returnable on the day on which it is issued at any time after twelve o'clock noon and before six o'clock in the afternoon." (L. 1921, ch. 199.)

> "Section 1421 (in part). PRECEPT; HOW SERVED. * * * If the precept is returnable on the day on which it is issued, it must be served at least two hours before the hour at which it is returnable." (L. 1921, ch. 199.)

Statement of the Case

A summary statement of the case and of the argument is set forth in the petition.

Specification of Error to Be Urged

The error to be urged is identical with the reason for the allowance of writ set forth in the foregoing petition.

ARGUMENT

New York Civil Practice Act, Sections 1419 and 1421, to the extent that they permit the issuance of a final order and an eviction in summary proceedings upon two hours' notice, should be held unconstitutional as sanctioning the deprivation of property upon insufficient notice and therefore without due process of law.

As has been pointed out in the petition, this constitutional question was raised by petitioner at the outset and has been consistently preserved throughout the course of the litigation. From his initial motion to vacate the final order (R. 11) through his application to the Appellate Division (R. 68), as well as at every intermediate stage, petitioner has protested the invalidity of the proceeding on the ground that the statutory provisions for two-hour notice contravened the first subdivision of Amendment XIV to the Constitution of the United States.

The two sections of the Civil Practice Act whose constitutionality petitioner has challenged purport to regulate in part the procedure in summary proceedings for the recovery of real property. Section 1419 declares in substance that where the ground of the summary proceeding is that the tenant is a holdover after the expiration of his term, the precept may in the judge's discretion be made returnable on the afternoon of the day of issuance. Section 1421, so far as material, enacts that in such cases the precept must be served at least two hours before the hour at which it is returnable.

The question before the Court is whether two hours constitute a reasonable time within which a litigant or his counsel may appear before the tribunal issuing the precept and assert such defense as may be available to the proceeding. At the outset it must be remembered that a precept in summary proceedings need not be served personally upon the person to whom it is directed (generally the tenant). If the person be absent from his dwelling-house, it may be served by delivering a copy "to a person of suitable age and discretion who resides there," or, if this is not reasonably convenient "to any person of suitable age and discretion employed there"; or, indeed, if neither of these methods is feasible, by affixing one copy to a conspicuous part of the property and by mailing another to the person to whom it is directed. The statute expressly so provides (Civil Practice Act, Section 1421, subdivisions 2 and 3).

Certainly if service is accomplished in one of the foregoing fashions and the precept is returnable in two hours, defaults on the part of the tenants must be the rule rather than the exception. Although the tenant is fortunate enough to be at home when the process is served, we submit that within the space of two hours it is not ordinarily possible to communicate with a lawyer, make an appointment to meet him, retain him, confer with him, have him prepare an answer and have him attend in court at the appointed hour. Even in a great city, where lawyers are reputed to be plentiful and the means of communication and travel are alike excellent, it is extremely doubtful whether the average litigant could move with sufficient despatch to safeguard his rights in such a situation.

What then are we to think of the plight of petitioner herein, himself a lawyer? The papers are served at his home a few minutes after ten in the morning (or so the landlord says). Petitioner has already left and is on his way to a court engagement in a neighboring county. His

wife, taking care of two little children along with her other household duties, is unable to reach him by telephone despite efforts directed to that end. But the papers are returnable in the Municipal Court at 12:05 P. M. It may be remarked that respondent invoked the two-hour method on an affidavit that it was obliged to deliver possession of the premises to another tenant that very day (R. 6-7), when as a matter of fact three days later there was still no sign of the new tenant on the premises (R. 12). Respondent proceeded post-haste to obtain its final order by default at 12:05 P. M., and the same afternoon a marshal appeared on the scene, evicted petitioner's wife and children and placed his household effects on the sidewalk. And still petitioner was not aware that a summary proceeding had been instituted against him. The tenor of the New York statutes is such as to render proceedings of which the foregoing is a fair sample, perfectly legal and permissible.

The terms of the Fourteenth Amendment, however, stand as an effective bar to the validity of any such high-handed methods. Due process has as one of its prime requisites the giving of reasonable notice to any defendant or party whose rights are sought to be affected. One of the leading cases on this subject is *Roller* v. *Holley*, 176 U. S. 398, 44 L. Ed. 520. There this Court had under consideration the validity of a Texas statute providing for five days' notice to a non-resident in a suit to foreclose a lien on realty. The process was served in Virginia six days before the return date (January 8th, 1891), although under provision of the law the case could not have been called for trial on default until January 9th, when the default was actually taken and judgment was entered. It appeared that in those days it required four days of traveling to reach the court from the point where service was effected. This Court held that under the circumstances of that case the notice given was insufficient to constitute due process of law. With respect

to the argument that the default might have been opened, the Court wrote (by Mr. Justice Brown):

> "Very probably, too, the court which rendered the judgment would have set the same aside, and permitted him to come in and defend; but that would be a matter of discretion—a contingency he was not bound to contemplate. The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."

That excerpt applies with almost prophetic force to the situation of the present petitioner, who, despite his striving, has to this day not yet succeeded in having his so-called default opened. He adduced a perfect excuse (his absolute ignorance of the pendency of the proceedings), he moved with unexampled diligence (obtaining an order to show cause on the very day when the summary proceeding was commenced—and concluded) and he showed a meritorious defense (a renewal of the tenancy). Yet he found himself as effectively out of court as out of the premises from which he had been so precipitately evicted.

In the same case Mr. Justice Brown quoted with approval the rules expressed in 2 Chitty's General Practice 175 regarding summary proceedings:

> "The time appointed must always allow sufficient opportunity, between the service of the summons and the time of appearance, to enable the party to prepare his defense and for his journey; and the justice should in this respect take care to avoid any supposition of improper hurry, or he may incur the censure of King's Bench, if not be subject to a criminal information. The precise time will generally depend on distance, and the other circumstances of each particular case. With analogy to other branches of the law, a man should

> not be required, *omissis omnibus aliis negotiis,* instantly to answer a charge of a supposed offense necessarily less than an indictable misdemeanor, on the same or even the next day, and should be allowed not only ample time to obtain legal advice and assistance, but also to collect his evidence; and even the convenience of witnesses should be considered; and therefore, in general, several days should intervene between the time of summons and hearing. In the superior courts in general, at least eight days' notice of inquiry and of trial are essential for the preparation of the defense."

No tenant should be charged with the absolute duty—much less should his counsel—of forsaking all other business and considerations in order to appear in court in answer to a summary proceeding within two hours, on pain of being ejected from his property and relegated to the often illusory, as herein, privilege of asking leave to defend as matter of favor than of right.

In other instances the courts of New York have not been remiss in recognizing the importance of notice as an essential ingredient of due process. Thus, in *Finn* v. *Chase National Bank,* 176 Misc. 127, 27 N. Y. S. 2d 771, the Appellate Term, First Department, held:

> "Personal service of a summons of the City Court of New York in Illinois, requiring the defendant to appear and answer in New York in six days is invalid as not reasonable and adequate notice, and therefore violative of the due process clause of the Fourteenth Amendment of the United States Constitution."

Similarly, in *Clarke* v. *Carlisle Foundry Co.,* 150 Misc. 710, 270 N. Y. S. 351, it was said:

> "Inadequate opportunity to appear and answer is equivalent to no notice or opportunity at all. ' * * * A

> legislature cannot enact that no notice be given, or make that a notice which is no notice at all. To do that would be a fraud on the Constitution.' Martin v. Central Vermont R. R. Co., 50 Hun 347, 350, 3 N. Y. S. 82, 83."

The principle involved is one that is universally recognized and applied. Unless a statute in itself provides for the giving of notice and an opportunity for hearing before property or the possession thereof can be taken, it violates the constitutional inhibition against taking property without due process of law. *Rassner* v. *Federal Collateral Society*, 299 Mich. 206, 300 N. W. 45. Notice and an opportunity to be heard are essential elements of due process of law. *Voeller* v. *Neilston Warehouse Co.*, 136 Ohio St. 427, 26 N. E. 2d 442. No one may lawfully be deprived of his property without notice and a hearing. *Mud Bay Logging Co.* v. *Dept. of Labor & Industries*, 189 Wash. 285, 64 P. 2d 1054. Notice and a hearing are essential to due process. *Tyson* v. *Tyson*, 219 N. C. 617, 14 S. E. 2d 673. And the notice required by the Constitution must be reasonably calculated to give the defendant actual notice of the proceedings. *Hackner* v. *Guaranty Trust Co.* (C. C. A. 2) 117 F. 2d 95.

The indignation felt by this Court over the manner of accomplishing an ejectment in *Windsor* v. *McVeigh*, 93 U. S. 274, 23 L. Ed. 914, finds an absolute parallel herein. There Mr. Justice Field wrote:

> "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him or giving

him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.

"That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party the opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party, of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party: appear, and you shall be heard; and, when he has appeared, saying: your appearance shall not be recognized, and you shall not be heard. In the present case, the district court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation: it was, in fact, a mere arbitrary edict, clothed in the form of a judicial sentence."

In the light of the doctrine declared by this Court and by others, petitioner feels that the statutes under consideration, permitting the issuance of a final order upon two hours' notice, particularly when viewed in conjunction with the provisions for constructive service or service on persons other than tenants, far transcend any adjudication as to the limits of permissible notice. Situations must frequently

arise where the tenant, as herein, could not possibly be aware of the commencement of the proceeding until after his default has been taken and a final order entered. He may not lawfully be remitted to the supposed discretion of a court through an application to open a default—a right which proved so tenuous herein. However consuming may be the landlord's desire for possession, the tenant may well have lawful and sufficient objections to the granting of that relief, and the streamlined process afforded the landlord by the statute is destructive of any reasonable likelihood that the respective contentions of the parties will be adjudicated in orderly fashion. Petitioner feels that upon full deliberation this Court will hold the offending statutes unconstitutional.

CONCLUSION

For the reasons stated above, the application for a writ of certiorari should be granted.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1944

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against

FORT TRYON GARDENS, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ABRAHAM J. HALPRIN,
Attorney for Respondent,
170 Broadway,
New York, New York.

SIDNEY R. ROSSITER,
BERNARD ROTHMAN,
ALFRED C. BENNETT,
of Counsel.

104 GROSBY PRESS, INC., 30 Ferry St., N. Y. C.—BEckman—3-2336-7-8

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Preliminary Statement

Petitioner's application for a writ of certiorari attacks the constitutionality of a statute of the State of New York regulating the procedure in summary proceedings for the recovery of real property.

Petitioner, an attorney, was a tenant in the premises owned by the respondent, under a written lease expiring at midnight, September 14th, 1943 (R. 6). Petitioner knew, as early as June 1943, that the respondent had leased the very apartment occupied by him to another tenant under the terms of a written lease commencing on September 15th, 1943 (R. 6).

Upon his failure to vacate the premises on September 15th, 1943, after the expiration of his term, the respondent instituted proceedings to recover possession of the property. The precept and petition were served in accordance with the terms of the statute, on September 15th, 1943. Upon petitioner's default, a final order was issued, awarding respondent possession (R. 7).

Thereafter, petitioner moved to vacate his default and to dismiss the proceedings for want of jurisdiction (R. 8-14). This application was denied on September 30th, 1943 (R. 16). An appeal was then taken to the Appellate Term of the Supreme Court, First Department, which was argued in the January 1944 Term of that Court (R. 70). (Hereafter referred to as "the first appeal.")

On March 2nd, 1944, the order of Mr. Justice Curtin, which denied petitioner's motion, was reversed, and the case remitted to the Municipal Court to determine whether or not the petitioner had been given the two hour notice required by the statute (R. 17).

Instead of applying for leave to appeal to the Appellate Division from the order of the Appellate Term and urging the unconstitutionality of the Statute, petitioner accepted the benefits of the order on the first appeal and thereafter, and on March 9th, 1944, appeared in Court with Counsel and tried out the issue of whether or not adequate notice, in accordance with the Statute, had been given (R. 17-57). This hearing resulted in the order of Mr. Justice Toney, dated March 9th, 1944, which overruled petitioner's claim that he was not served within the statutory time, and overruled his motion to vacate the final order, which had been issued on September 15th, 1943 (R. 57).

Thereafter, petitioner again appealed to the Appellate Term of the Supreme Court, First Department (hereafter referred to as "the second appeal"). That Court, by order dated June 14th, 1944, affirmed the order of Mr. Justice Toney, without opinion (R. 58).

Petitioner thereafter made application to the Appellate Term for leave to appeal to the Appellate Division, which application was denied by order dated June 29th, 1944 (R. 64).

Finally, petitioner made application to the Appellate Division for leave to appeal to that Court from the determination of the Appellate Term on "the second appeal," which was denied by order dated October 13th, 1944 (R. 79-80).

It is thus clear that the petition for a writ of certiorari involves only "the second appeal", which presents solely a question of fact, *i.e.*, whether the petitioner was, or was not given the two hour notice prescribed by Statute.

Petitioner, by failing to move for leave to appeal to the Appellate Division after the entry of the order of the Appellate Term on "the first appeal", and by accepting that order and trying out the traverse, has precluded himself from any consideration by this Court on his present application for a writ of certiorari.

It is obvious, under such circumstances, that (1) no Federal question is presented; (2) petitioner has not exhausted all possible steps afforded by State procedure for review by the highest State Court; (3) petitioner, by accepting the benefits of the order on the first appeal, has waived the Federal question; (4) by trying out the issue of whether or not the precept and petition was served in the statutory time, petitioner has had his day in Court, and has been afforded due process.

Statement

Since the petitioner would have this Court believe that respondent "swooped down" and evicted him from his apartment with only two hours notice, we will set forth the undisputed facts in order to apprise this Court of the real situation.

Petitioner, an attorney, was a tenant in the premises owned by the landlord under a written lease expiring at midnight, September 14th, 1943 (R. 9).

In the month of May, 1943, petitioner received a letter from respondent asking him to renew his lease. On June 1st, 1943, petitioner wrote respondent informing it that he did not intend to renew his lease. In reliance upon petitioner's statement that he did not intend to renew his lease, the respondent on June 15th, 1943 rented the apartment to another tenant (Bonnfeld) for a term commencing at the expiration of his tenancy, to wit, September 15th, 1943 (R. 6, 42, 43).

In spite of petitioner's previous avowal that he did not intend to renew his lease, upon hearing that the apartment had been rented to a new tenant, he, as early as June 1943, told Mr. Bonnfeld that respondent would have trouble getting him (petitioner) out. Moreover, petitioner was notified by registered mail in July and August of 1943, that his apartment had already been rented and that he would have to vacate on September 15th, 1943 (R. 42, 43).

On September 15th, 1943, petitioner was still in his apartment, and, in order to give occupancy to Mr. Bonnfeld, who was entitled to possession on that day, it was necessary to evict petitioner on two hours' notice. Not only did petitioner attempt to intimidate Mr. Bonnfeld, but he interfered with the Marshal in the execution of the

warrant to obtain possession. It became necessary to call the police to assist the Marshal in his duties (R. 72, 73).

As a result of the actions on the part of the petitioner and his wife, two Magistrate's Court proceedings arose. In the first proceeding, the petitioner and his wife charged that two employees of the respondent had assaulted her in connection with obtaining possession on September 15th, 1943. At the same time, respondent made a cross complaint against petitioner by reason of his unlawful interference with the Marshal in the execution of a lawful mandate of the Court (R. 72, 73).

At this hearing before the Magistrate, it was suggested that both complaints be withdrawn. Counsel for respondent was satisfied to do this. Petitioner, however, refused to accept the suggestion of respondent or the Magistrate. After a full hearing before the Magistrate, respondent's two employees were acquitted (R. 72, 73).

Subsequently, a trial was had on the complaint made by respondent against the petitioner and his wife. Prior to the commencement of that hearing, respondent's counsel again consented to withdraw this charge, if petitioner and his wife would execute releases. Once more, petitioner refused, and the trial was had.

After a hearing, the Magistrate acquitted petitioner's wife and held petitioner to await the action of the Court of Special Sessions. On a hearing before that Court, the complaint against petitioner was dismissed (R. 72, 73, 77).

After the charge against petitioner's wife in the Magistrate's Court had been dismissed, she thereafter commenced, and there is now pending, an action in the Supreme Court of the State of New York, by her and petitioner to recover damages in the amount of $75,000 for malicious prosecution and false arrest.

Petitioner also has commenced an action for damages for alleged false arrest against the respondent, seeking to recover the sum of $50,000.

It was brought out on the hearing before Mr. Justice Toney that petitioner was then and is now occupying an apartment at premises 924 West End Avenue under a written lease which expires September 30th, 1945.

As further indicative of the lengths to which petitioner will go, to lay the foundation for another damage suit, is the statement on pages 10 and 11 of his brief, where he states:

> "What then are we to think of the plight of petitioner herein, himself a lawyer? The papers are served at his home a few minutes after ten in the morning (or so the landlord says). Petitioner has already left and is on his way to a court engagement in a neighboring county. His wife, taking care of two little children along with her other household duties, is unable to reach him by telephone despite efforts directed to that end."

On the hearing before Mr. Justice Toney, the petitioner testified that he did not go to Court in the morning, but on the contrary, went at or about two o'clock in the afternoon (R. 37).

It is regrettable that all these facts must be gone into, and that a member of the Bar will indulge in this type of practice, but we are endeavoring to show that this petitioner does not need the apartment, and that even though the question raised by this petitioner is moot, that he believes that if he will harrass the respondent long enough, it will pay him some money to get through with this litigation.

No claim is advanced by the petitioner that he needs the apartment for occupancy. He is in possession of another

apartment under a written lease expiring on September 30th, 1945, and it therefore requires no extended argument to demonstrate the real reason underlying this application (R. 41).

It is clear that petitioner, an attorney who can litigate without cost to himself, feels that if he continues his policy of harassment, it may result in his securing some financial benefit at the respondent's expense. That practice of this type should not be countenanced reqaires no extended argument.

POINT I

The petition should be denied since (a) no Federal question is presented; (b) petitioner has not exhausted all possibilities afforded by State procedure for review by the highest State Court; (c) petitioner, by accepting the benefits of the order on the first appeal, has waived the Federal question; (d) by trying out the issue of whether or not the precept and petition was served in the statutory time, petitioner has had his day in Court, and has been afforded due process.

The record is clear that on the first appeal petitioner failed to apply for leave to appeal to the Appellate Division. On the contrary, he accepted and acted under the order of that Court and tried out the issue of whether or not he had been given two hours' notice.

Let us examine the effect of such conduct. Under State law, petitioner was thus precluded from further pursuing "the first appeal". The law is well settled in this State, that an appellant cannot accept the benefit of a part of an order or judgment and appeal from the balance. (*Bennett* v. *Van Syckel*, 18 N. Y. 481; *Knapp* v. *Brown*, 45 N. Y. 207,

209; *Carll* v. *Oakley*, 97 N. Y. 633, 634; *Alexander* v. *Alexander*, 104 N. Y. 643; *Kraeger* v. *Warnock, et al.*, 81 App. Div. 150.)

It was for this reason, no doubt, that petitioner failed to apply for leave to appeal to the Appellate Division. As a result, when petitioner took his "second appeal", there was no longer before the Appellate Term a Federal question, it having been waived. Moreover, by failing to apply for leave to appeal to the Appellate Division on "the first appeal", the petitioner did not exhaust all remedies afforded him by State procedure for review by the highest possible State tribunal. Petitioner had the right to appeal to the Appellate Division, by making an application to that Court for leave to appeal from the decision of the Appellate Term rendered on "the first appeal" (New York State Civil Practice Act, Sec. 623, Subd. 1; Rule VII of the Rules of the Appellate Term, First Judicial Department; Rule X of the Rules of the Appellate Division of the Supreme Court, First Judicial Department).

In dismissing petitions for writs of certiorari, this Court has held that such failure is fatal.

In *Osment* v. *Pitcairn and Nicodemus*, 317 U. S. 587, this Court stated:

> "As it does not appear that petitioner has exhausted the appellate review provided by state law, the petition for certiorari must be denied for want of jurisdiction."

Again, in *Gorman* v. *Washington University*, 316 U. S. 98, this Court stated at pages 100 and 101:

> "It was the purpose of the Judiciary Act of February 13, 1925, as well as that of all its predecessors, that no decision of a State court should be

> brought here for review either by appeal or certiorari until the possibilities afforded by state procedure for its review by all state tribunals have been exhausted."

To the same effect, see *Stratton* v. *Stratton*, 239 U. S. 55.

This Court, obviously, will not entertain a petition for a writ of certiorari where the question presented, on its face, is frivolous.

The basis of petitioner's complaint here, is that Sections 1419 and 1421 of the Civil Practice Act, to the extent that they permit the issuance of a final order of eviction in summary proceedings instituted upon two hours' notice, should be held unconstitutional, as sanctioning the deprivation of property upon insufficient notice, and is therefore without due process of law.

The record is clear that petitioner had his day in Court after the order on "the first appeal" was made, and there litigated the issue of whether he had received two hours' notice.

If petitioner felt aggrieved and was of the opinion that the order of the Appellate Term on "the first appeal" was erroneous, he need not have accepted its decision. He might have made an application for leave to appeal to the Appellate Division on the ground that the entire proceeding was void because of the alleged insufficient notice.

Instead of availing himself of this opportunity, he accepted the benefits of the order of that Court, had a full and complete hearing, and only after he was defeated, claimed that the final order is not valid because it was obtained under a Statute which afforded him only two hours' notice.

The petitioner intimates in his brief (p. 11) that there was no need for speed as the new tenant did not move in for at least three days after September 15th, and that there was therefore no necessity for a proceeding instituted on two hours' notice. The fact that the tenant did not move in for a few days thereafter did not change respondent's obligation to give him possession on the 15th as the new tenant's lease started from the 15th. It was only because of the petitioner's refusal to vacate and his keeping possession of the apartment contrary to the law, to the Marshal and to the police who endeavored to give possession to the landlord, that the new tenant could not get in as the apartment required some decorating.

POINT II

Since the question presented is moot, the petition should be denied.

It is well established that this Court will not consider moot questions, and that where subsequent events have made it impossible to grant any effectual relief, the petition must be dismissed. (*St. Pierre* v. *U. S.*, 319 U. S. 41, 42; *Lewis Publishing Co.* v. *Wyman*, 228 U. S. 610, 615; *Mills* v. *Green*, 159 U. S. 651, 653.)

The facts in our case fall squarely within these rules. The respondent was awarded possession on September 15th, 1943 of an apartment occupied by the petitioner, as tenant. Petitioner's lease had expired on September 14th, 1943. Mr. Bonnfeld is now in possession of the premises under a written lease which commenced on September 15th, 1943.

Under these circumstances, no effective judgment could be rendered by this Court, since it would be impossible, even upon a holding that petitioner's ouster was illegal by virtue of the unconstitutionality of the statute, to put him in possession of his apartment again, and oust the present tenant.

Moreover, under the Emergency Price Control Act of 1942 and the regulations issued by the Office of the Price Administrator, it is impossible to remove the tenant, Bonnfeld, in this case. Said Act provides that a tenant cannot be removed unless the owner needs the apartment for his own personal use, which element is not present herein.

Another insurmountable obstacle is present in this case which renders any effectual judgment by this Court impossible.

Assuming the statute is unconstitutional and the final order is vacated, respondent would then have to commence another proceeding upon at least five days' notice to recover possession. Petitioner's defense asserted in the State courts was that there was an oral renewal of the lease for an additional term of one year from September 15th, 1943 to September 14th, 1944 (R. 9).

It is clear that at the present time, petitioner could have no possible claim to possession of the apartment since any possible rights to such possession expired on September 14th, 1944.

It is respectfully submitted that since lapse of time has made it impossible for this Court to grant petitioner any effectual relief, his petition should be denied.

POINT III

The two hour notice provided by Sections 1419 and 1421 of the New York Civil Practice Act, was a reasonable exercise of police power by the State Legislature. The notice provided therein was reasonable under the special circumstances and purposes for which these sections were enacted.

The Statutes Involved

The pertinent sections of the Civil Practice Act of the State of New York are, as follows:

> "Section 1419. PRECEPT; RETURN. The precept must be returnable not less than five nor more than ten days after it is issued; except that, where the proceeding is taken upon the ground that a tenant continues in possession of demised premises after the expiration of his term without the permission of his landlord and the application is made on the day of the expiration of the lease or on the next day thereafter, the precept may, in the discretion of the judge or justice, be made returnable on the day on which it is issued at any time after twelve o'clock noon and before six o'clock in the afternoon." (L. 1921, ch. 199.)

> "Section 1421 (in part). PRECEPT; HOW SERVED. * * * If the precept is returnable on the day on which it is issued, it must be served at least two hours before the hour at which it is returnable." (L. 1921, ch. 199.)

These two sections provide for at least five days' notice where a landlord seeks recovery of demised premises for reasons other than the expiration of the tenancy. Where

recovery was sought on the ground that the tenant held over after the expiration of his term, without the landlord's permission, a two hour notice is required. However, the legislature, as a further safeguard, provided that the precept initiating the proceeding under such circumstances could only be issued in the Court's discretion. No question can be raised in this Court that such discretion was improperly exercised, nor does petitioner claim an abuse of discretion on the part of the Court in issuing the precept.

The summary and speedy method for the recovery of possession of property under these special circumstances has existed in this State by statutory enactment since at least 1820. The Laws of 1820, Chapter CXCIV, Section 1, provided in substance that the summons (now called the precept) could issue and be made returnable the same day.

A similar provision was contained in the Revised Statute of 1829, Part 3, Chapter 8, Title 10, Sections 28, 29 and 30. A further similar provision was enacted by the Laws of 1851, Chapter 460, Section 30.

The statute first appeared substantially in its present form by the Laws of 1868, Chapter 828. That statute provided, so far as is material, as follows:

> "* * * If the summons be issued on the day the term expires or on the next day thereafter it may direct such summons to be made returnable on the same day, at any time after twelve o'clock noon and before six o'clock in the afternoon."
>
> * * *
>
> "If the summons be returnable on the day on which it is issued it shall be served at least two hours before the hour at which it is made returnable."

A reading of Sections 1419 and 1421 of the Civil Practice Act makes it obvious that the legislature, in following the long-established custom prevailing in this State since at least 1820, enacted these sections so that a landlord could speedily oust a tenant, who was staying in possession of premises after the expiration of his term. The obvious purpose for such speed was that it would be unfair to require that landlords wait to enter into new leases to the very day when the old lease expires.

It has been repeatedly adjudicated that legislation affecting residents of a state, and property situated therein, is the proper subject of the state's police power. It is further well settled that the inhibition upon the deprivation of property without due process of law is not violated by the legitimate exercise of legislative power, in securing the general public welfare and in the protection of the property rights of its citizens. (*Atlantic Coast Line R. Co.* v. *City of Goldsboro*, 232 U. S. 548, 558; *Chicago and Alton R. Co.* v. *Transbarger*, 238 U. S. 67, 77.)

Petitioner's complaint is that he was not afforded due process in a procedural matter. The law is clear that procedural due process is satisfied when a person is given reasonable notice and opportunity to defend at some stage of the proceeding. In our case, the statute provided for a two hour notice.

That such notice was reasonable, is clear from the following. The statutory pattern is such that persons who may be ousted on two hours' notice are tenants whose tenancies expire on a day certain. Such definite expiration date may occur in two ways. In the first place, the lease, by its terms, may expire on a day certain. If, however, the tenant occupies the premises for an indefinite period

as a tenant at will, or on a month to month basis, the Real Property Law, by Sections 228, 232(a) and 232(b), provides that before the summary proceeding can be initiated, a thirty days' notice must be served upon him.

It is thus clear that in this State, before a tenant may be ousted as a hold-over, he already knows, either by the very terms of his lease, or by a thirty day notice, that his tenancy will terminate on a day certain.

It should not be overlooked that the petition in the case at bar contained an allegation that such thirty day notice had been given, apart from the fact that the petitioner had been notified by registered mail on at least three occasions from June of 1943 that the respondent had relet the apartment to a new tenant for a term commencing September 15th, 1943 (R. 5).

The New York City Municipal Court Code, Section 5, has divided the City of New York into various convenient districts, in each of which districts a different Municipal Court is situated.

By Section 17, subd. 1, of the same Code, summary proceedings to recover real property must be brought in the district court in which the property is situated.

The record is clear that the premises where petitioner resided were only five minutes away from the Municipal Court in which these proceedings were instituted. Petitioner's wife, who was served with the precept and petition at 10:02 A. M. had ample opportunity to be present in Court, as the petition was returnable at 12:05 P. M. (R. 26).

The case of *Roller* v. *Holly*, 176 U. S. 398, cited at page 11 of petitioner's brief, has no application to the facts presented here.

This was pointed out in the case of *Goodrich* v. *Ferris*, 214 U. S. 71, which is peculiarly applicable to the facts presented herein, where the Court at pages 80 and 81 stated:

> "While various decisions of this court and of the courts of two states are cited in the brief of counsel for appellant under each of the foregoing propositions, none of them are apposite, and indeed, although citing them, counsel have specifically commented upon but one; viz., Roller v. Holly, 176 U. S. 398. * * * That case, however, concerned the validity of original process by which the conceded property of a non-resident, situate within the jurisdiction of the State of Texas was sought to be subjected to the control of its courts. The proposition which was presented for decision in that case was whether a statutory notice of five days, given to a resident of Virginia, requiring him to appear in Texas and defend a suit brought against him to foreclose a vendor's lien upon his land, constituted reasonable and adequate notice for the purpose. Manifestly that case is not in any particular analogous to the one under consideration, which is a case involving the devolution and administration of the estate of a decedent,—a subject peculiarly within state control. Case of Broderick's Will * * *, 21 Wall 503, 519. * * *"

The Court stated at page 81:

> "As held in Bellingham Bay and B. C. R. Co. v. New Whatcom, 172 U. S. 314, 318 * * *, even although the power of a state legislature to prescribe length of notice is not absolute, yet it is certain 'that only in a clear case will a notice authorized by the legislature be set aside as wholly ineffectual on account of the shortness of the time.'"

In *Kennard* v. *The State of Louisiana*, 92 U. S. 480, a State statute providing for the removal of a Judge by a proceeding initiated on only twenty-four hours' notice, and further limiting the time to appeal from a determination to one day after the rendition of a judgment, was held to constitute due process. The Court, at page 483, stated:

> "Due process of law does not necessarily imply delay; and it is certainly no improper interference with the rights of the parties, to give such cases as this precedence over the other business in the courts.
>
> * * *
>
> "From this it appears that ample provision has been made for the trial of the contestation before a court of competent jurisdiction; for bringing the party against whom the proceeding is had before the court, and notifying him of the case he is required to meet; for giving him an opportunity to be heard in his defense; for the deliberation and judgment of the court; for an appeal from this judgment to the highest court of the State, and for hearing and judgment there. A mere statement of the facts carries with it a complete answer to all the constitutional objections urged against the validity of the Act. The remedy provided was certainly speedy; but it could only be enforced by means of orderly proceedings in a court of competent jurisdiction in accordance with rules and forms established for the protection of the rights of the parties. In this particular case, the party complaining not only had the right to be heard, but he was in fact heard, both in the court in which the proceedings were originally instituted and, upon his appeal, in the highest court of the State."

In addition, Sections 1419 and 1421 of the Civil Practice Act were, in themselves, notice to petitioner that he could be ousted at the expiration of his lease, upon two hours' notice.

In *Anderson National Bank* v. *Luckett*, 88 L. ed. Advance Opinions 499, the Court at page 505 stated:

> "The statute itself is notice to all depositors of banks within the state, of the conditions on which the balances of inactive accounts will be deemed presumptively abandoned, and their surrender to the state compelled. All persons having property located within a state and subject to its dominion must take note of its statutes affecting the control or disposition of such property and of the procedure which they set up for those purposes. Reetz v. Michigan, 188 U. S. 505, 509, 47 L. ed. 563, 566, 23 S. Ct. 390; North Laramie Land Co. v. Hoffman, 268 U. S. 276, 283, 69 L. ed. 953, 957, 45 S. Ct. 491. Proceedings for the assessment of taxes, the condemnation of land, the establishment of highways and public improvements affecting landowners, are familiar examples."

The Court further stated at page 506:

> "The fact that a procedure is so old as to have become customary and well known in the community is of great weight in determining whether it conforms to due process, for 'Not lightly vacated is the verdict of quiescent years.' "

The Court further stated at page 507:

> "What is due process in a procedure affecting property interest must be determined by taking into account the purposes of the procedure and its effect upon the rights asserted and all other circum-

stances which may render the proceeding appropriate to the nature of the case. Davidson v. New Orleans, 96 U. S. 97, 107, 108, 24 L. ed. 616, 620, 621; Ballard v. Hunter, supra (204 U. S. 255, 51 L. ed. 471, 27 S. Ct. 261); North Laramie Land Co. v. Hoffman, supra (268 U. S. 282, 283, 69 L. ed. 957, 45 S. Ct. 491); Dohany v. Rogers, supra (281 U. S. 369, 74 L. ed. 912, 50 S. Ct. 299, 68 A. L. R. 434), and cases cited The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. If that is preserved, the demands of due process are fulfilled. Measured by this standard, we cannot say that the present notice is insufficient."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Abraham J. Halprin,
Attorney for Respondent,
170 Broadway,
New York, New York.

Sidney R. Rossiter,
Bernard Rothman,
Alfred C. Bennett,
of Counsel.

(GP6605)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 995

SIMON METRIK,

Petitioner,

—against—

FORT TRYON GARDENS, INC.,

Respondent.

PETITION AND BRIEF IN SUPPORT OF APPLICATION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI AND OTHER RELIEF

JACOB W. FRIEDMAN,
Attorney for Petitioner.

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SIMON METRIK,

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Respondent.

PETITION FOR REHEARING AND OTHER RELIEF

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Simon Metrik, respectfully prays this Court to reconsider its determination made on April 2, 1945, which denied his petition for a writ of certiorari to the Appellate Term, First Department, of the Supreme Court of the State of New York. That determination affirmed an order of the Municipal Court of the State of New York, denying petitioner's motion to vacate a final order in a summary proceeding, which final order awarded the respondent possession of certain apartment premises in the City of New York (R. 57-59). The time for filing the present petition for rehearing has been extended by Mr. Justice Jackson to and including May 24, 1945.

The Court is referred to the original petition and brief filed herein in February, 1945, the contents whereof are reiterated and incorporated herein.

Petitioner has been deprived of the possession of the aforesaid premises by a summary proceeding under New York Civil Practice Act, Sections 1419 and 1421, pursuant to which the respondent as landlord obtained a final order and succeeded in evicting petitioner upon two hours' notice (and this notice only a constructive notice, without personal service on petitioner). All of the petitioner's efforts to obtain a trial on the merits have not availed, and it is his contention that those statutes do not provide sufficient notice and therefore sanction a violation of due process of law, is disregard of the Fourteenth Amendment, Section 1, of the Constitution of the United States.

In opposition to the arguments advanced by petitioner, respondent adduced several untenable considerations, as will be concisely shown in the subjoined brief.

Respondent also required petitioner to print an unusually long record, entirely unnecessary for a determination of the question presented, and in violation of the rules of this Court.

The question of whether a dispossess proceeding may be commenced and terminated all within two hours, notwithstanding the constitutional requirement mentioned, is an important one and likely to arise quite frequently. It is desirable that it should be clarified by a plenary review, to the end that the validity or invalidity of the statutes be settled or better understood, and, more specifically, that this petitioner should not be unjustly ousted.

Your petitioner therefore respectfully submits that a rehearing should be granted herein; that the determination of this Court denying the writ of certiorari be set aside; that such writ be granted to review the aforesaid determination; and that petitioner have other appropriate relief.

Dated: New York, New York, May 24, 1945.

SIMON METRIK

By JACOB W. FRIEDMAN,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 995

SIMON METRIK,

Petitioner,

—against—

FORT TRYON GARDENS, INC.,

Respondent.

BRIEF ON APPLICATION FOR REHEARING

In opposition to the substantial reasons heretofore urged for the allowance of the writ, respondent raised a number of points, none of which are meritorious. They will be concisely considered in the order in which they were presented.

I

Respondent argued that no Federal question was presented but assigned no reason for this assertion.

Respondent declared further that petitioner had not exhausted all remedies in the state courts, contending that on a prior intermediate appeal to the Appellate Term the petitioner had not attempted to obtain a review by the Appellate Division. The reason why this procedure was followed was that petitioner hoped upon the hearing of the traverse, to have the service declared invalid. In fact, he did not seek recourse in the Supreme Court of the United

States until all avenues of additional review in the state courts were closed. He attempted to obtain an orderly determination in an orderly way. When his first appeal to the Appellate Term resulted in a reversal, it would have been absurd for him to seek a further review at that intermediate stage, for the Appellate Division would have undoubtedly required that he proceed with the traverse before looking for different relief. It was only when he was finally denied his day in court and after the Appellate Division refused on his motion to entertain an appeal from the last determination of the Appellate Term that he filed his petition for certiorari. Respondent has little to say about the last application to the Appellate Division but stresses the earlier and intermediate determination of the Appellate Term so as to make it appear that petitioner did not exhaust his state remedy. The authorities cited by respondent deal clearly with situations wherein petitioner sought to hurdle state appeal courts. That is plainly not the case here, for petitioner proceeded absolutely as far as the state laws permit.

By the same token, it cannot be said that petitioner waived any rights by accepting the alleged benefits of the first appeal. He merely was acting with the consistent hope of obtaining a day in court, and at every single stage of the proceeding he urged the unconstitutionality of the statutes involved. Certainly, a trial of the issue of whether the precept was served in more or less than two hours may not be held a day in court. The argument of respondent's that petitioner had a full and complete hearing is contrary to the facts.

II

Respondent argues that the question presented is moot, for the reason that respondent has until now succeeded in

evicting petitioner from the premises, and his alleged renewal tenancy would have expired on September 14, 1944. This argument is unsound, for no illegal act can be validated by the speed with which it is consummated or the lapse of time necessitated for relief in the courts, especially when petitioner's efforts to undo the wrong were instituted on the very day of the commencement of the proceeding and have continued uninterruptedly since that day.

Respondent also, surprisingly enough, has invoked the Emergency Price Control Act of 1942 and the regulations issued by the Office of the Price Administrator, to show that "it is impossible to remove the tenant" (referring to the new tenant who was given possession by respondent in place of petitioner). That very statute would have rendered it equally impossible for respondent to remove petitioner if this Court should ultimately hold that he was deprived of his possession without due process of law and was therefore entitled to be restored to possession. In short, the lapse of time has not made it impossible for this Court to grant petitioner effectual relief.

III

With all of respondent's argument and authorities, it has not cited a single case wherein this Court has held valid a statute permitting an action or proceeding to be commenced and terminated within two hours or in comparable time. The closest approach is apparently the decision in *Kennard* v. *Louisiana*, 92 U. S. 480, 23 L. Ed. 478, upholding a statute making certain process returnable in 24 hours. If that feature alone should not be sufficient to distinguish the case, a reading of the opinion discloses that the party affected duly answered and was given a trial on the merits, the outcome of which was in turn duly reviewed on appeal. Therefore, the individual claim to be aggrieved not only had the

right to be heard but was in fact heard both on trial and on appeal, and these circumstances expressly were made the *ratio decidendi* of the Supreme Court of the United States.

Respondent adduced nothing to detract from the force of the authority of *Roller* v. *Holley*, 176 U. S. 398, 44 L. Ed. 520.

IV

Irrespective of the disposition of the present application, we desire to call the court's attention to the fact that, as indicated in our original petition and brief (pp. 3-4), about one-half of the transcript of record (R. 17-57) consists of testimony on the hearing as to the time of service, none of which is germane to the question of law presented herein, but was included on the insistence of respondent, which declined to stipulate as to any curtailment of the record. It is provided in Rule 13, Subd. 9, of the Rules of this Court:

> "If either party shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper."

Under the circumstances, we submit that respondent should be required to pay costs accordingly.

It must be shocking to lawyers and litigants alike to learn that in the State of New York there is a statute on the books whereby a person can be deprived of the possession of real property through the medium of a proceeding that is begun and ended all within two hours—and that a proceeding wherein personal service is not required but the process may be left at his home. Were this Court to hold that this is

a compliance with the requirements of due process, unfortunate and oppressive results might follow. The question presented is surely one that is deserving of the fullest consideration.

CONCLUSION

Petitioner respectfully urges, for all of the foregoing reasons, as well as those presented in his original papers, that this Court rescind its determination made on April 2, 1945, denying his petition for a writ of certiorari and that it grant such writ to the Appellate Term, First Department, of the Supreme Court of the State of New York, to review its determination, and that it make such order as to costs as may be just.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1944

No. 995

SIMON METRIK,

Petitioner,

against

FORT TRYON GARDENS, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO APPLICATION TO ASSESS PRINTING COSTS AGAINST IT

ABRAHAM J. HALPRIN,
Attorney for Respondent,
170 Broadway,
New York, New York.

ABRAHAM J. HALPRIN,
SIDNEY R. ROSSITER,
ALFRED C. BENNETT,
of Counsel.

104 GROSBY PRESS, INC., 30 Ferry St., N. Y. C.—BEekman—3-2336-7-8

Supreme Court of the United States

October Term, 1944

No. 995

SIMON METRIK,

Petitioner,

against

FORT TRYON GARDENS, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO APPLICATION TO ASSESS PRINTING COSTS AGAINST IT

The petitioner has presented to this Court a petition in support of an application for rehearing of his petition for a writ of certiorari which was heretofore denied.

In connection with that application he seeks to charge respondent with one-half of the cost of printing the record pursuant to Rule 13, subdivision 9 of the Rules of this Court on the ground that such one-half was unnecessarily caused to be printed. This brief is directed solely to the issue of whether or not one-half of such printing costs should be charged against respondent. This portion of the record consists of the testimony on the hearing to determine whether or not the petitioner was given the two hour notice required by the New York statute (R. 17-57). However,

no facts whatsoever are set forth in the petition or in the brief to support the conclusory statement that the printing of this testimony was unnecessary.

Prior to the printing of the record, petitioner sought a stipulation under which the entire testimony was to be omitted from the record, and in its place substituted merely the statement that a hearing on the traverse was held and was decided in favor of the respondent.

It is obvious, as will hereafter be demonstrated, that the original petition for a writ of certiorari could have not been properly opposed unless this testimony was printed and the facts contained therein brought to this Court's attention.

Under Point III of our original brief in opposition to the petition (pp. 12-19) we contended that the two hour notice provided by Sections 1419 and 1421 of the Civil Practice Act was a reasonable exercise of police power by the State Legislature; and that the notice provided therein was reasonable under the special circumstances and purposes for which those sections were enacted. In order to establish that the two hour notice afforded the petitioner reasonable opportunity to get to the courthouse, the testimony sought to be eliminated by the petitioner conclusively established the distance from the petitioner's home to the courthouse, and the time it took to reach that courthouse (R. 25-28).

In addition, this testimony was most vital for it showed that the respondent did not "swoop down" upon petitioner on September 15th, 1943 on a mere two hours' notice, but that since as early as June 1943, petitioner knew that respondent had leased the very apartment occupied by him

to another tenant under the terms of a written lease commencing on September 15th, 1943; and that from June through September, 1943 petitioner was notified orally and by mail that he would have to vacate the premises on September 15th, 1943 (R. 41-43).

Under Point II of our brief in opposition to the petition, we argued that it should be dismissed since a moot question was presented (pp. 10-11). The undisputed facts are that the petitioner's lease expired on September 14th, 1943, and that in the State courts he claimed an oral renewal of one year which, if successful, would have entitled him to possession until September 14th, 1944. It thus became abundantly clear that at the time of the presentation of the petition, the petitioner could have no possible claim to possession of the apartment since any possible rights to such possession expired on September 14th, 1944.

Moreover, it was uncontradicted that a Mr. Bonnfeld was in possession of those premises under a written lease which commenced on September 15th, 1943 and could not be ousted.

Finally, it was uncontradicted that the petitioner had since September 15th, 1943 occupied other premises at 924 West End Avenue under a written lease which expired on September 30th, 1945, and that he did not need the apartment in respondent's building. All of these facts were contained in the testimony which was conveniently sought to be eliminated by petitioner (R. 41-43).

Finally, it was most necessary to print all of this testimony to conclusively show that no substantial Federal question was presented by the petitioner.

CONCLUSION

The application to assess printing costs against respondent and for a rehearing should be denied.

Respectfully submitted,

ABRAHAM J. HALPRIN,
Attorney for Respondent,
170 Broadway,
New York, New York.

ABRAHAM J. HALPRIN,
SIDNEY R. ROSSITER,
ALFRED C. BENNETT,
of Counsel.